

³ ALJ Order (Mar. 4, 2005) at 2.

The respondent contends the ALJ erred in failing to grant its request to terminate benefits. Respondent maintains that although it had entered into an Agreed Order on August 24, 2004 to provide claimant with treatment for injuries he sustained in the August 28, 2003 accident, his involvement in a subsequent accident on September 14, 2004 "relieves respondent from further liability for benefits after that date."⁴

Claimant maintains the ALJ's Order should be affirmed and he should be allowed the treatment he was originally intended to have pursuant to the Agreed Order entered into by the parties in August of 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was involved in an automobile accident on August 28, 2003 which he alleges was work related. He alleges injuries to his neck, head, back, bilateral shoulders and upper extremities. Respondent has provided some temporary total disability benefits and medical treatment. Claimant was referred to Dr. John Dickerson who, following an MRI, diagnosed multi-level degenerative disc disease with osteophytes and left radiculopathy. He recommended conservative treatment including physical therapy, medications and epidural injections.

There was apparently some difficulty arranging the physical therapy suggested by Dr. Dickerson. Nevertheless, claimant continued to see him. As late as June 2004, Dr. Dickerson was still recommending the epidural injections, an EMG and physical therapy. Claimant still had pain in his neck and numbness in the 3rd, 4th and 5th fingers of his left hand and the anterior arm when holding his cell phone. Even with the restrictions imposed by Dr. Dickerson, claimant continued to work for respondent up to June 15, 2004, when he quit.

On August 24, 2004, the parties entered into an Agreed Order whereby Dr. Dickerson was designated as the treating physician. This Agreed Order reflects respondent's agreement to provide testing and treatment as ordered by Dr. Dickerson, including an EMG and epidural injections. While treating with Dr. Dickerson, claimant's primary complaints were to his neck, left shoulder and numbness into his left arm and hand. The EMG and an MRI were completed in early September 2004.

On September 14, 2004, claimant was involved in a non-work related incident. Claimant, a pedestrian, was struck by a truck traveling about 10 miles per hour. Police and paramedics were called to the scene. Claimant complained of pain in his neck, thoracic

⁴ Respondent's Brief at 2 (filed Apr. 11, 2005).

area and numbness in his left arm. He was treated and released with pain medication and a diagnosis of neck sprain, abrasions and contusions.

At the preliminary hearing, claimant testified that generally his pain and physical complaints were the same after this most recent accident as they were before. While he admits that immediately after he was struck by the truck in September 2004 his pain was worse for a time, his complaints of pain in his neck, shoulder and the numbness have never gone away since his 2003 accident. His present complaints are the same as those he was making before the 2004 accident.

As a result of the 2004 accident, respondent refused to provide the treatment encompassed by the August 24, 2004 Agreed Order, and filed a preliminary hearing request to terminate benefits. In response, claimant filed an application for penalties seeking an order punishing respondent for its failure to provide the medical treatment previously ordered.

After hearing the claimant's testimony and reviewing the parties' exhibits, the ALJ denied both parties' requests. She was not persuaded that the September 14, 2004 accident caused any aggravation of claimant's work related injuries. The ALJ made it clear that respondent was still required to comply with the contents of the Agreed Order entered into by the parties on August 24, 2004.

The underlying issue in this case is whether claimant's current physical complaints and his undisputed need for treatment arose out of his employment with respondent.

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.⁵

Thus, the Board has jurisdiction to hear this matter.

Where a condition is shown to have been caused or aggravated by a subsequent intervening injury, respondent's liability for providing medical treatment ends.⁶ However, like the ALJ, the Board is unpersuaded that the September 14, 2004 accident caused anything but possibly a temporary aggravation. It is clear that claimant has, for the better part of a year, been complaining of neck, left shoulder and arm pain along with numbness as a result of his August 28, 2003 accident. Dr. Dickerson ordered an MRI, EMG, physical

⁵ K.S.A. 44-534a(a)(2).

⁶ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

therapy and ultimately epidural injections. There was a delay in providing this treatment and after an Agreed Order, dated August 24, 2004, the EMG and MRI were completed. Unfortunately, before the physical therapy and epidural injections could commence, claimant was the victim of battery at the hands of an unknown driver on September 14, 2004.

While claimant could certainly have sustained more significant and lasting injuries following this most recent accident, he apparently did not. His present complaints are identical to those he voiced before his accident. The Board finds the ALJ's conclusions with respect to this issue are sound and should be affirmed. The Agreed Order of August 24, 2004 remains in full force and effect. Respondent shall provide the medical care ordered by Dr. Dickerson.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.⁷

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 4, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2005.

BOARD MEMBER

c: Alisa Nickel Ehrlich, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁷ K.S.A. 44-534a(a)(2).